United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

727

BRIEF FOR APPELLANT AND JOINT APPENDIX

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,461

SUE O. BROWN,

Appellant,

v.

FAIRLAWN AMUSEMENT COMPANY,

Appellee.

Appeal from the United States District Court
for the District of Columbia

JACK H. OLENDER
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INDEX

TABLE OF CASES

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* Cases or authorities chiefly relied upon are marked by asterisks.

(2) That the Trial Court erred in concluding as a matter of law that plaintiff took upon herself the risk of the danger allegedly causing her to fall, and that such danger was unconcealed, obvious at the time and could have been avoided with proper care.

The pending case has not previously been before this Court.

REFERENCES TO RULINGS

Appellant appeals from the Order Granting Summary Judgment of July 10, 1969.

STATEMENT OF CASE

This is an appeal from an Order of the United States District Court for the District of Columbia entered herein on July 10, 1969, granting summary judgment to the defendant.

Plaintiff (Appellant) sued defendant (Appellee) for damages for personal injuries sustained by plaintiff when she tripped and fell, on March 7, 1966, on a broken walk-way.

Defendant had a perpetual right of easement or way over the area on which the walk-way was located (JA 4).

At the time of the accident, plaintiff was walking across the area where she fell, towards an opening in a low brick wall around the defendant's parking lot, from which she intended to go across the parking lot on the way to her home (JA 7, 8). Plaintiff had followed this route about a week before and the condition was about the same at that time (JA 7, 8).

The condition causing plaintiff to trip and fall was a badly broken walk-way (JA 14, 15).

ARGUMENT

I

DESIGNATION OF PLAINTIFF AS "BARE LICENSEE" OR "LICENSEE BY ACQUIESCENCE" AND CONCLUSION THAT DEFENDANT BREACHED NO DUTY TO PLAINTIFF ARE ERRONEOUS

The Trial Court found that plaintiff, at the time of her accident, was a "bare licensee" or "licensee by acquiescence." It is submitted that this categorization as a matter of law, was erroneous and that the categorization is irrelevant to a determination of defendant's duties and plaintiff's rights. The real issue is whether defendant exercised due care under all the circumstances.

The most recent and comprehensive review of and statement of the law which has been found and which supports plaintiff's contention that the ordinary rule of negligence applies, is *Daisey v. Colonial Parking, Inc.*, 118 U.S. App. D.C. 31, 33-34, 331 F.2d 777 (1963):

> In any event, although the opening statement permitted, it did not require classification of plaintiff as a "trespasser" for the purpose of determining the defendants' duty of care. Other classifications, discussed in *Firfer v. United States*, 93 U.S. App. D.C. 216, 208 F.2d 524 (1953), include (1) invitees, (2) licensees by invitation (direct or implied), and (3) bare licensees or licensees by acquiescence. An invitee enters land for the benefit of both himself and the landowner or the landowner alone. A licensee by invitation is one "invited upon the land not for the benefit of the landowner but by him either by some affirmative act or by appearances which would justify a reasonable person in believing that such landowner (or occupant) had given his consent to the entry of the particular person or of the public generally." *Id.* at 219, 208 F.2d at 527. Persons in these classes

"may expect the owner and his agents to exercise reasonable and ordinary care and to provide reasonably safe premises," *ibid.*, and to refrain from active negligence. One who enters "not by invitation or permission but by mere sufferance or acquiescence," *id.* at 219, 208 F.2d at 528, is a "bare licensee," who may receover if defendants "knowingly permit such licensee to run upon a hidden peril . . . ." *Ibid.*

Clearly plaintiff was not an invitee. But we think the opening statement in this case contemplated evidence upon which a jury could find "appearances which would justify a reasonable person in believing" that there was "consent to the entry of the . . . public generally" onto defendants' property. Such a finding would constitute plaintiff "a licensee by invitation" to whom defendants owed a duty "to exercise reasonable and ordinary care and to provide reasonably safe premises." And even if plaintiff entered merely by "sufference or acquiescence" so as to be a bare licensee, the evidence might have shown the chain to be a "hidden peril." "Dangers that reasonably careful people are likely not to discover are latent or hidden." *Gleason v. Academy of the Holy Cross,* 83 U.S. App. D.C. 253, 254, 168 F.2d 561, 562 (1948).

Our discussion of the subsclassifications and exceptions to the invitee-licensee-trespasser trinity shows that discreet classifications are being replaced by a logical continuum equivalent to the ordinary rule of negligence requiring due care under all the circumstances. In 1958 the Supreme Court decided that admiralty cases would be governed by the ordinary rule of negligence rather than by classifications

based on the common law's "conceptual distinctions." Writing for a unanimous Court, Mr. Justice Stewart said:

> "The distinctions which the common law draws between licensee and invitee were inherited from a culture deeply rooted to the land, a culture which traced many of its standards to a heritage of feudalism. In an effort to do justice in an industrialized urban society, with its complex economic and individual relationships, modern common-law courts have found it necessary to formulate increasingly subtle verbal refinements, to create subclassifications among traditional common-law categories, and to delineate fine gradations in the standards of care which the landowner owes to each. Yet even within a single jurisdiction, the classifications and subclassifications bred by the common law have produced confusion and conflict. As new distinctions have been spawned, older ones have become obscured. Through this semantic morass the common law has moved, unevenly and with hesitation, towards "imposing on owners and occupiers a single duty of reasonable care in all the circumstances." [*Kermarec v. Compagnie Generale Transatlantique,* 358 U.S. 625, 630-31 (1959).]"

And in *Hecht Co. v. Jacobsen,* 86 U.S. App. D.C. 81, 180 F.2d 13 (1950), where "the charge given to the jury below proceeded on the theory that there are three degrees of care and, upon the authority of the elevator cases, that appellant [department store] was obligated to exercise the "highest degree of care'" in the maintenance of its escalator, we said:

> "We do think, however, that it would have been more in accord with the modern authorities to discuss the standard of conduct required of appellant in terms of 'reasonable care under all the circumstances.' That formula contains within it the

> potential for flexibility in application . . . necessary to deal with the infinite number of fact situations which may arise. It readily permits change with changing circumstances." [*Id.* at 83, 180 F.2d at 15.]

> As applied to trespassers the standard of ordinary care does not impose new burdens on landholders. They remain masters of their domain. And they are not expected to assume burdens of care which are unreasonable in the light of the relative expense and difficulty to them as weighed against the probability and seriousness of the foreseeable harm to others. But when the trespassers are not only reasonably foreseeable, but reasonably expected, the landholder may be required to exercise due care to keep trespassers out, warn them of hazards, or otherwise protect them."

It appears from the above-quoted language that the class in which the Trial Court placed the plaintiff is not determinative. But, assuming *arguendo,* that the plaintiff's class is relevant to her rights and the defendant's duties, from the record and from further evidence that may be introduced at trial, "a jury could find appearances that would justify a reasonable person in believing that there was consent to the entry of the public generally onto defendant's property," or that persons such as plaintiff are "reasonably expected" to enter the premises. The plaintiff has not been given the opportunity to prove the surrounding circumstances which would be relevant to her rights and to defendant's duties.

It is respectfully submitted that plaintiff is entitled to a jury's consideration of all the facts that may be produced at trial in reaching a determination of the ultimate issues of rights, duties and breach of duties. Reasonable men could differ in resolving these issues; as stated by the Court in *McGettigan v. National Bank of Washington,* 115 U.S. App. D.C. 384, 386, 320 F.2d 703 (1963):

Whether a defendant has acted as a reasonable man in the circumstances is said to depend upon whether his conduct – act or omissions – created an unreasonable risk of harm toward a plaintiff. This principle is sometimes stated in terms of duty, viz., whether the defendant had a duty to use care toward plaintiff, and if so whether it was breached by the conduct complained of . . . . The ultimate question is whether defendant can fairly be said to be responsible for the injuries complained of. If reasonable men could not differ in answering that question the court, it is said, should not allow the jury to speculate about it; but if reasonable men could differ and draw different inferences from the facts or find one set of facts when two are offered and from those found could conclude that defendant's conduct was negligent, then the jury ought to be permitted to answer the ultimate question. *Grand Trunk R. Co. of Canada v. Ives,* 144 U. S. 408, 12 S. Ct. 679, 36 L.Ed. 485 (1892).

II.

WHETHER PLAINTIFF TOOK UPON HERSELF THE RISK OF THE DANGER CAUSING HER TO FALL, AND WHETHER SUCH DANGER WAS UNCONCEALED, OBVIOUS AT THE TIME AND AVOIDABLE WITH PROPER CARE ARE JURY QUESTIONS

It is respectfully submitted that the Trial Court erred in concluding as a matter of law that plaintiff took upon herself the risk of the danger allegedly causing her to fall, and that such danger was unconcealed, obvious at the time and could have been avoided with due care. The record herein does not present a situation where the Court, having heard all the evidence, is in a position to rule on these issues as a matter of law.

The deposition of plaintiff, which is the basis for the Trial Court's conclusions, does not contain a full description of how the accident happened. The defendant did not inquire of plaintiff "how did the accident happen?" "what did you trip on?" etc. A reading of the transcript shows that defendant's questioning of plaintiff was devoted to eliciting responses from the plaintiff, who had been under psychiatric care, to pointed questions on isolated

matters such as ownership of the property where the accident occurred, lighting conditions, prior experience, and description of the scene, without any attempt to obtain an explanation of just how the accident happened.

The fact the plaintiff followed the same route about a week before does not establish that she was contributorily negligent or assumed the risk as a matter of law. *Nielsen v. Barclay Corp.*, 103 U.S. App. D.C. 136, 255 F.2d 545 (1958); *Trust v. Washington Sheraton Corporation,* No. 4462, District of Columbia Court of Appeals, April 3, 1969; knowledge alone of a condition is insufficient to charge appellant with contributory negligence or assumption of risk as a matter of law. *Mosheuvel v. District of Columbia,* 191 U.S. 247 48 L.Ed. 170 (1903); *Kane v. Northern Central Ry.*, 128 U.S. 91 (1888); *Altemus v. Talmadge,* 61 App. D.C. 148, 58 F.2d 874 (1932); *cert. denied,* 287 U.S. 614 (1932); *Trust v. Washington Sheraton Corporation, supra.*

The record before the Court does not establish exactly what the lighting conditions were and what was apparent to plaintiff. For example, in response to the question "and it was daylight?" plaintiff responded "It was light." (JA 8). But later she testified in response to the question "Was it getting dark at that time?" that it was "A little bit dark, yes." (JA 11). A jury is uniquely qualified to evaluate the plaintiff's deameanor from a witness stand and her understanding of the questions posed her, along with other evidence that may be produced at trial, in making a determination of the conditions at the site of the accident and the manner in which the accident occurred.

Whether the plaintiff was acting as a reasonable person in walking where she tripped and fell is a jury question. The issue is analogous to that in *Mosheuvel v. District of Columbia,* 191 U.S. 247, 266, 48 L.Ed. 170, 178 (1903):

> Was the situation of the water box and the hazard to result from an attempt to step over it so great that the plaintiff, with the knowledge of the situation, could not, as a reasonably prudent person, have elected to step across the box, instead of stepping to the sidewalk from either side of

> the tread of the last step? And this, we think, was under the undisputed proof, a question for the jury, and not for the court.

In sum, plaintiff's deposition does not disclose all the facts surrounding the occurrence, only those defendant wished to elicit. The record is not in a posture for a determination on the merits.

> The Rule "authorizing summary judgment only where . . . is is quite clear what the truth is, . . . the purpose of the rule is not to cut litigants off from their right of trial by jury if they really have issues to try." *Dewey v. Clark,* 86 U.S. App. D.C. 137, 143, 180 F.2d 766, 772. In this case "the pleadings, depositions, and admissions on file, together with the affidavits" do not make "clear what the truth is." Genuine issues of negligence, causation, and damages remain to be tried.
>
> *Edwards v. Mazor Masterpieces, Inc.,* 111 U.S. App. D.C. 202, 204-205, 295 F.2d 547 (1961)

CONCLUSION

For the reasons hereinabove advanced, Appellant respectfully prays that the Order Granting Summary Judgment be reversed and the cause be remanded to the Trial Court for further proceedings.

Respectfully submitted,

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Attorneys for Appellant

INDEX TO JOINT APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA CIVIL DIVISION

SUE O. BROWN 1614 R Street, S. E. Washington, D.C. *Plaintiff,* v. FAIRLAWN AMUSEMENT COMPANY A Delaware Corporation Serve: Registered Agent D. C. Incorporation Company 1343 Good Hope Road, S. E. Washington, D. C. and PAULINE CAROLINE WALTHER 1430 Minnesota Avenue, S. E. Washington, D. C. and HERBERT LANDSMAN HELEN LANDSMAN 6101 – 16th Street, N. W. (Apt. 914) Washington, D. C. *Defendants.*	Civil Action No. 188-68

RELEVANT DOCKET ENTRIES

1968	
January 24	Complaint, appearance; Jury demand
February 21	Answer of Defendant #1 to complaint; c/m 2/20/68
1969	
June 5	Motion of Defendant #1 for summary judgment; P & A's; statement; c/m 6/4/69. M.C. 6/5/69.
June 12	Memorandum of P & A of plaintiff in opposition to motion for summary judgment; c/m 6/11/69. filed.
July 10	Order granting defendant's motion for summary judgment. (N) Corcoran, J.
August 7	Notice of appeal by Plaintiff from order of 7/10/69, Copy to Steptoe and Johnson, Deposit $5.00 by Olender. filed.

COMPLAINT
(for negligence – personal injuries)

1. Plaintiff, Sue O. Brown, is a citizen of the United States and a resident of the District of Columbia. Defendant Fairlawn Amusement Company is a Delaware corporation authorized to do business in the District of Columbia. Defendants Pauline Caroline Walther, Herbert Landsman and Helen Landsman are residents of the District of Columbia. The cause of action arose in the District of Columbia and the amount in controversy is in excess of $10,000.00, exclusive of costs and interest.

2. On and prior to March 7, 1966, the defendants were the owners of certain parcels of real estate in the District of Columbia situate on the east side of 14th Street, S.E., near the corner of Good Hope Road, S.E., and designated as Lots 800, 801, 306, 307, 802, 803, 310 of Square 5767, in the land records of the District of Columbia. The said defendants owned or had an easement, right of way, or tenancy at the rear of said parcels and controlled and maintained thereon a certain walk for the use of their customers, their tenant's customers, and other persons as might lawfully use the same.

3. The defendants and each of them carelessly, negligently, and recklessly maintained the walk and surrounding area in such a manner as to constitute a danger to persons who may have occasion to use the said premises and such condition continued on and through March 7, 1966.

4. On to wit, the 7th day of March, 1966, while the Plaintiff was lawfully and carefully walking on and across the said property of the defendants, she was caused by the negligently maintained condition of the walk and the area surrounding the same to trip and fall over a badly broken walk, as a result of which she suffered serious, painful, and permanent injuries to her person.

5. By reason of the aforesaid fall and the injuries resulting therefrom the plaintiff suffered excruciating pain, mental anguish, confinement, disability, and embarrassment and will continue to do so permanently. As a further result of

the aforesaid fall and injuries, the Plaintiff incurred medical, hospital and other related expenses and will continue to incur such expenses; lost considerable time from her employment and will continue to lose time from her employment; suffered a permanent injury which will result in continued pain and disability and continued expenditures as well as other diverse losses and expenses all to her damage in the full sum of $100,000.00.

WHEREFORE, plaintiff demands judgment against the defendants and each of them both jointly and severally in the full sum of $100,000.00, besides interest and costs.

/s/ Milton M. Burke
Attorney for Plaintiff

/s/ Jack H. Olender
Attorney for Plaintiff

JURY DEMAND

Plaintiff requests trial by jury as to all issues.

/s/ Milton M. Burke
Attorney for Plaintiff

/s/ Jack H. Olender
Attorney for Plaintiff

ANSWER OF DEFENDANT FAIRLAWN AMUSEMENT COMPANY

First Defense

The complaint fails to state a claim against defendant Fairlawn Amusement Company upon which relief can be granted.

Second Defense

Defendant Fairlawn Amusement Company answers the numbered paragraphs of the complaint as follows:

1. Defendant Fairlawn Amusement Company admits that it is a Delaware corporation authorized to do business in the District of Columbia. This defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph 1 of the complaint.

2. This defendant denies that it was the owner of certain parcels of real estate in the District of Columbia mentioned in paragraph 2 of the complaint. This defendant admits that on or about February 12, 1943, William J. Walther and Lottie C. Walther granted this defendant "a perpetual right of easement or way" over certain property designated as Lots 801 and 306 in Square 5767 recorded in Survey Book 142 at Page 419 in the office of the Surveyor of the District of Columbia. This defendant denies each and every other allegation contained in paragraph 2 of the complaint.

3, 4 and 5. This defendant denies each and every allegation contained in paragraphs 3, 4 and 5 of the complaint.

Third Defense

Defendant Fairlawn Amusement Company states that any injuries and damages allegedly sustained by plaintiff as set forth in the complaint were caused in whole or in part, or were contributed to, by the negligence of plaintiff and/or the other defendants herein.

Fourth Defense

The plaintiff had knowledge of and assumed the risks incident to her use of the property mentioned in the complaint. Any injuries allegedly received by plaintiff were caused by and arose out of such risks.

STEPTOE & JOHNSON

/s/ Laidler B. Mackall
Attorneys for Defendant
Fairlawn Amusement Company

[Certificate of Service, dated February 20, 1968]

EXCERPTS FROM DEPOSITION OF PLAINTIFF SUE BROWN

15 Q. Have you seen the complaint that was filed in the case in court by your lawyer? A. Have I seen it?

Q. Yes. A. Yes.

Q. Now, according to this complaint on March 7, 1966, you tripped and fell while walking across some property? A. Yes.

Q. And this was not a part of the public street? It was a sidewalk where you fell? A. It was " . . .

Q. It was not a part of the public sidewalk? Do you understand what I mean? Was it on the sidewalk that runs along the side of the street? A. No.

Q. It was not on the public sidewalk that would run along beside the street, is that right? A. What street?

Q. 14th Street. A. Well—I don't understand that.

MR. OLENDER: She said she doesn't understand.

BY MR. MACKELL:

Q. The place where you fell was the sidewalk running from the street to

16 the back of a theatre? A. Yes.

Q. And that as far as you know was on private property? A. As far as I know, yes.

Q. Now, the front of the theatre was on Good Hope Road? A. Yes.

Q. And 14th Street runs the same general direction as Good Hope Road? A. I think so, I am not sure.

Q. As you come up 14th Street with the theater on your left, what is the next cross street you come to? Is that U Street? A. No, that isn't U.

Q. What is that? A. I think that would be 14th Street.

Q. No, you are coming up 14th Street and the back of the theater is on your left. As you go on past the theater up 14th Street, what street do you come to? Is that U Street? A. Well, you would get to U Street before you got to 14th Street.

Q. What I am trying to do, Miss Brown, is locate this place where you say you fell. You came along 14th Street, didn't you, before you fell? A. Yes.

17 Q. And you turned to your left along this walk you were talking about, is that right? A. Yes.

Q. Now, if you had not turned to your left, but just kept walking along 14th Street, what was the first cross street you would come to? Is that U Street? A. Yes, that is U Street.

Q. Now, if 14th Street runs north and south, this property where you fell would be on the east side of 14th Street, wouldn't it? A. Well, I don't know.

Q. Do you know where the Anacostia River is in relation to where you say you fell? As you walked up 14th Street towards U Street, Southeast, was the river generally behind you? A. Well, I crossed the river on the bus before I get on the . . .

Q. So the river was somewhere behind you some distance away? A. Yes.

Q. Or would it be to your left? A. The river?

Q. Yes. A. Well, I don't know.

18 Q. Now, this walk that you—that runs from 14th Street to the back of the theater runs across an area that is used as a parking lot? A. Yes.

Q. And that was not paved, did not have cement or blacktop or anything like that? It was dirt, wasn't it, with a concrete walk going across it to the back of the theater? A. Yes.

Q. And as you went up this walk to your right, there was a low wall, brick wall? A. Yes.

Q. And on the other side of the brick wall was a paved parking lot? A. Yes.

Q. And that was the parking lot for the theater? A. Yes.

Q. Now, as you walked along beside this low brick wall, there was an opening in that wall, wasn't there? A. Yes.

Q. And this wall is about four feet high, would you say? A. Well, I guess.

Q. And you were walking towards this opening in the wall? A. Yes.

Q. And you intended to go through that opening and cut across the parking lot? A. Yes.

Q. You were taking a short cut from 14th Street to U Street? To cut off the corner, diagonally across the corner, is that right? A. Going to where, on U Street?

Q. Yes, instead of going up 14th Street and left on U Street, you cut across the parking lot, isn't that right? A. Yes, I did.

Q. And you had been this way before, hadn't you? You had followed this same general path before, hadn't you? A. Not too many times.

Q. But you had more than once before? A. More than once?

Q. Say about 10 times? A. I don't know how many times.

Q. Well, I don't know, but I followed it before.

Q. Well, can you tell me some rough idea about how many times? Would you say more than 10 times? A. No, I can't say, because I don't know.

20 Q. But you had b een across there before? A. Yes.

Q. And within a fairly short time before you fell? A. Yes, I was there that week before.

Q. You had been across that same way about a week before? Approximately? A. Yes.

Q. Now, the date you fell was March 7, 1966, according to your complaint? A. Yes.

Q. What caused you to fall? A. The street is very badly torn.

Q. By "street" you mean the walk running from 14th Street to the back of the theater? A. Well, the street that looked like to me is running out of the theater.

Q. Is it a street or a walkway that comes from the back of the theater? A. Well, I guess walkway or street?

MR. OLENDER: You answer the best you can, whatever you think it is.

THE WITNESS: Well, I call it a street.

21 Q. Your complaint, let me read you what the complaint says. "Paragraph 4: On to wit the 7th day of March 1966, while the plaintiff (that is you) was lawfully and carefully walking on and across the said property of the defendants, she was caused by the negligently maintained condition of the

walk and the area surrounding the same to trip and fall over a badly broken walk." Now, your complaint talks about a walk? Is that what it is? A. That is what it is, a walkway.

Q. Now, there was not any difference in the condition of that walk or the area where you fell between the time you fell and the time you had been there the week before, was there? It was the same as it had been the week before, wasn't it? A. Yes.

Q. And you, of course, had seen it when you were there the week before? A. Yes.

Q. You did not intend to go to the theater, did you? A. No, I was on my way home.

Q. You did not have any business with the theater? A. No.

Q. This happened about 6:30 p.m.? A. I will say 6:30.

22 Q. And it was daylight? A. It was light.

Q. Now, do you wear eye glasses? A. Yes.

Q. All the time? A. All the time.

Q. Were you wearing eye glasses then? A. Yes.

Q. You did not have any trouble seeing? A. No.

Q. The weather was clear and dry? A. I beg your pardon?

Q. The weather was clear and the area was dry? A. Yes.

Q. The ground was not wet. A. No.

Q. There wasn't any snow on the ground? A. No there wasn't.

Q. No cans or bottles or anything like that? A. No.

Q. You were not carrying any bundles or packages? A. My purse.

23 MR. MACKALL: Would you mark these as Defendant's deposition Exhibits 1, 2 and 3.

(Pictures marked defendants exhibits Nos. 1, 2 and 3 for identification and were retained by counsel.)

BY MR. MACKALL:

Q. Miss Brown, I show you a photograph that has been marked Defendant's Deposition Exhibit 1 for identification and ask you if that is the walk

we have been talking about? Maybe you can look at the exhibits 2 and 3 also. This is Exhibit 2 for identification. Is that walkway that is shown in Defendant's Deposition Exhibit 2 the walk we have been talking about? That is the one in this picture. A. Yes, that is the walk.

Q. And is the walk that is shown in Defendant's deposition Exhibit 1 for identification, this other picture, the walk we have been talking about? A. Yes.

Q. Now, would you take this pen and draw an arrow pointing to the place where you fell? Maybe you can point with your finger and I will mark it on there, if you want me to. A. Maybe I can tell on the others better.

MR. OLENDER: Can you recognize the place on these photographs?

THE WITNESS: Yes.

24 BY MR. MACKALL:

Q. Can you show me where and I will mark it on there. A. About here.

Q. About here? Let me mark it. I will put an arrow – Is this the place? A. That's right.

Q. And I will put an A. Now, is this "A" with an arrow pointing to a spot on this walk on Defendant's Deposition Exhibit 1 for identification where you fell on March 7, 1966. A. March 7.

Q. Is that the place where you fell? A. I think so.

Q. And is that about the way it looked at the time you fell? A. This is the way it looked at the time.

Q. And that is the way it looked when you came by there about a week before? A. Yes.

Q. Now, this wall on the right side of Defendant's Deposition Exhibit 2 for identification, is that the wall you were talking about earlier? A. This wall here?

25 Q. Yes. A. Yes.

Q. Suppose I mark that with an arrow and a "B"? This is the wall along here and you were intending to go through this opening in the wall. Maybe it shows clearer in this other picture. A. I don't see the –

Q. Right here. A. Right.

Q. You intended to go through the opening. I will mark that "B" with an arrow in red. And this is the opening here. The first "B" is marked on Defendant's Deposition Exhibit 2 for identification. I will make the same identification on Defendant's Deposition Exhibit 1 for identification. (Marking the photographs). And both of these pictures, the way the condition of this walk shown in these pictures is the way they looked on the day you fell? A. Yes.

Q. And the way they looked the week before? A. To the best of my knowledge.

Q. Now, I will show you what has been marked as Defendant's Deposition Exhibit 3 for identification and ask you if that large brick building is the
26 theater we have been talking about? A. This is the theater.

Q. And the wall that is shown in that picture is the one that goes around the theater parking lot? A. That brick wall.

Q. Yes. A. Yes, it goes around.

Q. Now, the street that runs from left to right across the picture, that is 14th Street? A. That street is going up, I would be going up from my house from that street, I think it is 14th Street.

Q. Right, well, let's look at Defendant's Deposition Exhibit 2 for identification. There is a corner of this brick wall, right here, isn't there? It comes down along the sidewalk and then goes in towards the theater, is that right? There is a corner right about here? And it goes on up on 14th Street? A. Yes.

Q. Let's mark that corner "C". In Defendant's Deposition Exhibit 2 for identification. (So indicated)

Q. Now, looking at Defendant's Deposition Exhibit 3, is the corner we marked "C" right about here?

MR. MACKALL: Maybe we could stipulate, Mr. Olender, if you are satisfied. As far as I know, it is.

BY MR. MACKALL:

27 Q. Does that look like the same corner we marked here? A. This corner here?

Q. Yes, this corner of the wall here. A. Well, I don't know, because—I don't know.

Q. But this is 14th Street along here, isn't it? A. May I see it? Yes, this is 14th Street.

Q. All right, let's mark this 14th Street. This is Defendant's Deposition 3 for identification, that is Southeast, isn't it? A. Yes.

Q. And this other street is U Street? A. That street, you mean?

Q. The one running across 14th Street. A. Yes, that is U Street, running across 14th Street.

Q. Let's mark that, this is on Defendant's Deposition Exhibit 3 for identification.

Q. I will put an arrow pointing in each direction. Is that right? The arrows indicate the direction U Street runs, is that right? A. Yes.

Q. Now, according to this complaint you suffered serious, painful and permanent injury to your person. Would you state exactly what these injuries were?

75 Q. What time of day did the accident occur? A. Around 6:30.

Q. And this was in March? A. Yes.

Q. Was it getting dark at that time? A. A little bit dark, yes.

ORDER GRANTING SUMMARY JUDGMENT

Upon consideration of defendant's motion for summary judgment, its statement of material facts as to which there is no genuine issue, its memorandum of points and authorities in support of its motion, plaintiff's memorandum of points and authorities in opposition to the motion and statement of additional material facts, the pleadings filed herein, the transcript of plaintiff's deposition and defendant's Deposition Exhibits 1 and 2, identified by plaintiff as photos of the scene of the accident, it appears to the Court that there is no genuine issue as to any of the following material facts:

a. That plaintiff received the injuries mentioned in the complaint when she fell on private property on a walk running from Fourteenth Street, S. E. across the parking lot to the rear of defendant's theater (D-15, 18);

b. That plaintiff was walking across the area where she fell, in order to cut across defendant's parking lot (D-18, 19), the same route she had followed about a week before (D-19, 20);

c. That plaintiff had prior knowledge of the defect allegedly causing her to fall since she had seen the condition of the place where she fell the week before and it was the same as when she fell (D-21);

d. That the accident happened during daylight and plaintiff had no trouble seeing, the weather was clear, the area was dry and there were no obstructions on the ground (D-22, 23);

e. That plaintiff was on her way home, did not intend to go to defendant's theater, had no business at the theater and plaintiff's use of the property was entirely and solely for her own convenience (D-21);

f. That the photographs identified by plaintiff at her deposition, defendant's Deposition Exhibits 1 and 2, show the condition of the place where she fell at the time she fell (Arrow "A"), which was the same as when she followed the same route a week before (D-23-27);

g. That the defect which caused plaintiff to fall was an unconcealed condition, natural to the place and of which plaintiff had prior knowledge.

The following conclusions of law appear to the Court to govern the disposition of defendant's motion for summary judgment:

a. Plaintiff was a bare licensee or licensee by acquiescence at the time she fell.

b. Plaintiff took upon herself the risk of the unconcealed danger allegedly causing her to fall, which was natural to the place, obvious at the time and could have been avoided with proper care.

c. Defendant breached no duty owed plaintiff.

The Court having concluded that defendant is entitled to judgment as a matter of law, it is this 10th day of July, 1969;

ORDERED, that defendant's motion for summary judgment be, and it hereby is granted.

/s/ Howard F. Corcoran
United States District Judge

[Certificate of Service, dated June 30, 1969]

NOTICE OF APPEAL

Notice is hereby given this 7th day of August, 1969, that Plaintiff Sue O. Brown hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 10th day of July, 1969.

/s/ Jack H. Olender
Attorney for Plaintiff

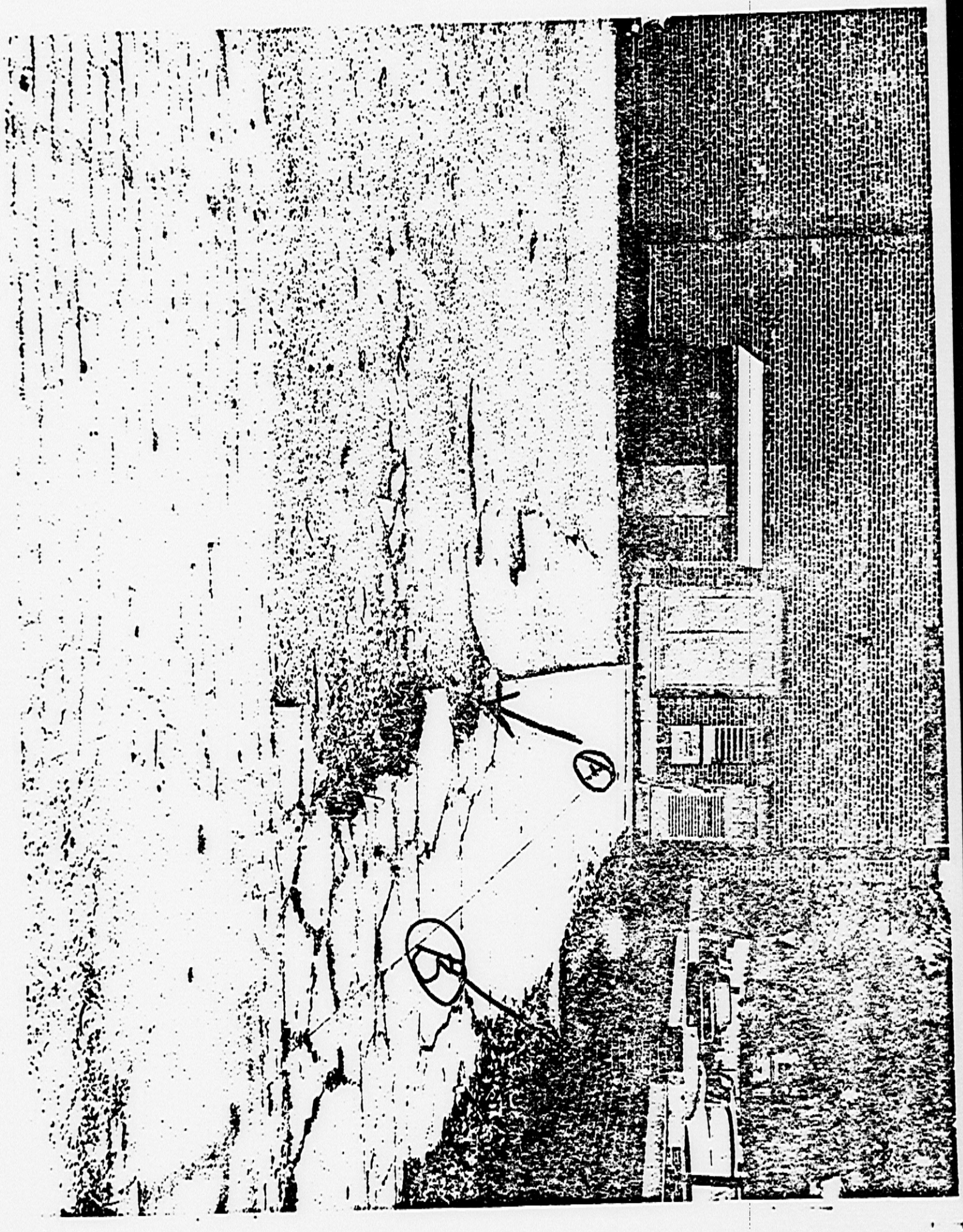

EXHIBIT 1

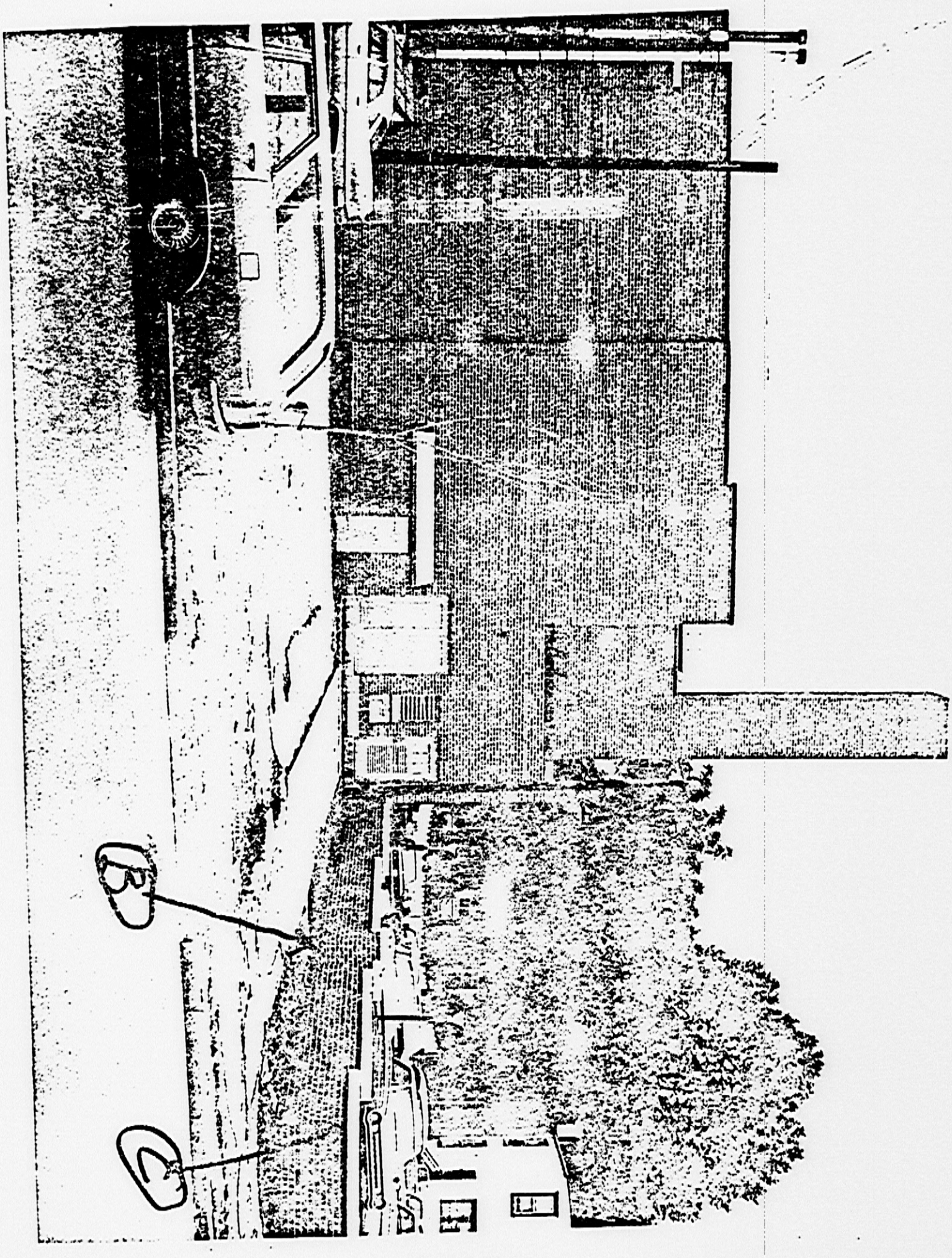

EXHIBIT 2

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,461

SUE O. BROWN,

Appellant,

v.

FAIRLAWN AMUSEMENT COMPANY,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

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TABLE OF CONTENTS

TABLE OF CASES

*Cases or authorities chiefly relied upon are marked by asterisks.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,461

SUE O. BROWN,

Appellant,

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FAIRLAWN AMUSEMENT COMPANY,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

COUNTER-STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

(1) Whether the trial court properly held that plaintiff's own deposition testimony and the picture-exhibits of the scene of the accident established that plaintiff was a bare licensee or licensee by acquiescence as a matter of law at the time she allegedly fell and was injured.

(2) Whether the trial court properly held that plaintiff's own deposition testimony and the picture-exhibits of the scene of the accident established that defendant breached no duty owed plaintiff as a matter of law.

(3) Whether the trial court properly held that plaintiff's own deposition testimony and the picture-exhibits of the scene of the accident established as a matter of law that she took upon herself the risk of the unconcealed defect allegedly causing her to fall which was obvious at the time and could have been avoided with proper care.

COUNTER-STATEMENT OF THE CASE

Plaintiff received the injuries alleged in the complaint when she fell on private property (JA 5), on a walk running from 14th Street, S.E. to the rear of defendant's theater across an unpaved, dirt parking lot (JA 6). Plaintiff was crossing the area where she fell in order to cut across defendant's adjacent parking lot (JA 6-7), the same route she had followed about a week before (JA 7).

Plaintiff had prior knowledge of the defect allegedly causing her to fall, having seen the condition of the place where she fell the week before and it was the same then as when she fell (JA 8). The weather was clear, the area was dry and there were no obstructions on the ground (JA 8). The accident happened during daylight and plaintiff had no trouble seeing.

Q. And it was daylight?

A. It was light.

Q. Now, do you wear eyeglasses?

A. Yes.

Q. All the time?

A. All the time.

Q. Were you wearing eyeglasses then?

A. Yes.

Q. You did not have any trouble seeing?

A. No. (JA 8)

Plaintiff was on her way home, did not intend to go to defendant's theater, had no business at the theater and plaintiff's use of the property was entirely and solely for her own convenience (JA 7-8).

Photographs identified by plaintiff at her deposition (Defendant's Deposition Exhibits 1 and 2 – JA 14-15), show the condition of the place where she fell at the time she fell (Arrow "A"), which was the same as when she followed the same route a week before (JA 7-11).

The cause of the accident was established by plaintiff's testimony set out below:

Q. What caused you to fall?

A. The street [walkway] is badly torn. (JA 7-8)

The defect which allegedly caused plaintiff to fall, of which she had prior knowledge, was obvious at the time and could have been avoided with proper care (JA 8, 14-15).

ARGUMENT

I

THE TRIAL COURT PROPERLY HELD THAT PLAINTIFF WAS A BARE LICENSEE OR LICENSEE BY ACQUIESCENCE AS A MATTER OF LAW AT THE TIME SHE ALLEGEDLY WAS INJURED

In order to make out a case against defendant, plaintiff must establish two basic elements: (1) that she was injured; and (2) that a breach by defendant of some duty owed plaintiff was a proximate cause of her injury.

> "It was not shown that the landlord failed in any duty owed to Mr. Lord, and under the circumstances the trial judge correctly concluded that Mr. Lord had failed to establish an element essential to his recovery." *Lord v. Lencshire House*, 1959, 106 U.S.App. D.C. 328, 331, 272 F.2d 557, 560.

Here, for the purposes of its motion for summary judgment, defendant did not dispute plaintiff's allegations of injury. However as we shall see, plaintiff's own testimony and the photographs depicting the scene of her claimed fall (JA 14, 15), establish as a matter of law that there was no breach of any duty owed plaintiff by defendant and therefore the trial court's grant of defendant's motion for summary judgment should be affirmed.

The duty owed and the degree of care required to be exercised by the occupier of land such as defendant, towards one who was, like plaintiff, allegedly injured while using his premises, has long been settled in the District of Columbia. The duty and the degree of care required depends upon the status of the injured person at the time of the accident. As this Court said in affirming a directed verdict for defendant on plaintiff's opening statement because no breach of duty was shown:

> "The duty owed and the degree of care required to be exercised by the landowner [to one injured while using his land] in turn depends upon the status of the insured person at the time of the accident; i.e., on whether he was an invitee, some type of licensee, or a trespasser." *Firfer v. United States,* 1953, 93 U.S.App.D.C. 216, 218, 208 F.2d 524, 526.

See also *Arthur v. Standard Engineering Co.,* 1951, 89 U.S.App.D.C. 399, 401, 193 F.2d 903, 905, cert. denied 343 U.S. 964. (Directed verdict for defendant affirmed. No breach of duty.)

The status of a person injured while using land occupied by another is determined by the "mutual benefit" test. Where the injured person, such as plaintiff here, is using the property for her own mere convenience or benefit, she is at most a bare licensee or licensee by acquiescence.

As this Court said in adopting the "mutual benefit" test as the more "soundly reasoned" and "correct solution of the problem" in a decision affirming a directed verdict against plaintiff-licensee on the ground there was no breach of any duty owed plaintiff:

> "We think the Kentucky court, following as it did the doctrine suggested by the Supreme Court, reasoned soundly and reached the correct solution of the problem. *We adopt, therefore, the mutual benefit test for determining whether the appellant was a licensee or an invitee,* in preference to the New York reasonable convenience doctrine.
>
> * * * * *
>
> "There was no evidence tending to show that the Standard Engineering Company had any interest in, or derived any benefit or advantage from the work done by Arthur * * *. So, under the mutual benefit test, Arthur was not an invitee." (Emphasis supplied) *Arthur v. Standard Engineering Co.,* 1951, 89 U.S.

App.D.C. 399, 402-403, 193 F.2d 903, 906-907, cert. denied 343 U.S. 964.

"The District of Columbia follows *the mutual benefit theory* with regard to invitees (authority). In other words, *only a person who goes upon the land of another for the purpose of their carrying on some transaction for the benefit of both parties (or for the benefit of the landowner alone) can attain the status of an invitee.*

"Invitor-invitee relationships are usually dependent upon the existence of an intention to carry on some commercial transaction. Obviously, in this case, no such transaction was contemplated and no such relationship was in existence." (Emphasis supplied) *Firfer v. United States*, 1953, 93 U.S.App.D.C. 216, 218-219, 208 F.2d 524, 526-527.

"We have adopted the 'mutual benefit' test as determinative of the issue [of the status of the one injured]. *Where the privilege of user* exists for the common interest or mutual advantage of the tenant and the landlord, the courts have found a case of invitation. *If that privilege exists for the mere convenience or benefit of the party relying upon and using it, we see a case of license.*

"Here we have no dispute as to the facts, and the evidence is overwhelming that Mr. Lord chose his path for his own interest and convenience. He was a licensee. True, he was not forbidden to use the garage entrance. *But mere permission to use, often exercised, did not enlarge his license or transform his status.*" (Emphasis supplied) *Lord v. Lencshire House*, 1959, 106 U.S.App.D.C. 328, 332, 272 F.2d 557 at 561.

Where the facts essential to the determination of the status of the injured party are not in dispute, as here, plaintiff's status is a legal question to be determined by the Court.

> "[W]here 'facts essential to the determination of * * * status are not in dispute', whether Mr. Lord was a licensee or an invitee presents 'a legal question for the Court' ". *Lord v. Lencshire House*, 1959, 106 U.S.App.D.C. 328, 331, 272 F.2d 557, 560.
>
> "But here the facts essential to the determination of appellant's status are not in dispute, and whether they showed him to be a licensee or an invitee was a legal question for the court." *Arthur v. Standard Engineering Co.*, 1951, 89 U.S.App.D.C. 399, 402, 193 F.2d 903, 906, cert. denied 343 U.S. 964.

Here, plaintiff's own testimony establishes that she was on her way home (JA 8), did not intend to go to defendant's theater (JA 8), had no business at the theater (JA 8) and plaintiff's use of the property was entirely and solely for her own convenience in order to take a shortcut across defendant's theater parking lot (JA 6-7). In light of these undisputed and undisputable facts, it is clear that the trial court's determination of her status as a bare licensee or licensee by acquiescence as a matter of law, cannot be seriously disputed by plaintiff.

II

THE TRIAL COURT PROPERLY HELD THAT DEFENDANT BREACHED NO DUTY OWED PLAINTIFF AS A MATTER OF LAW

The duty owed by the occupier of land to a bare licensee or licensee by acquiescence is merely to refrain from wanton injury and from knowingly permitting such licensee to run upon a hidden peril or a hidden engine of destruction.

> "The owner's duty to such a person [a bare licensee or licensee by sufferance or acquiescence] is less than that owed to a licensee by invitation: He is merely

required to refrain from wanton injury and he should not knowingly permit such licensee to run upon a hidden peril or a hidden engine of destruction.

* * * * *

"They [bare licensees or licensees by sufferance or acquiescence] may recover only for intentional, wanton, or wilful injury on the maintenance of a hidden engine of destruction." *Firfer v. United States,* 1953, 93 U.S.App.D.C. 216, 219, 208 F.2d 524, 527.

"'The doctrine appears to be universal that a licensor owes no duty to a licensee to provide safe places or premises for the occupancy or use of his license, save and except to abstain from doing any intentional, wilful (and in some jurisdictions gross reckless) act endangering the safety of the licensee'". *Arthur v. Standard Engineering Co.,* 1951, 89 U.S.App.D.C. 399, 402, 193 F.2d 903, 906, cert. denied 343 U.S. 964.

Here, there can be no dispute that plaintiff was not "wantonly injured" by defendant. The defect which allegedly caused plaintiff's fall, by no stretch of the imagination could be termed a "concealed danger", a "hidden peril" or a "hidden engine of destruction" (JA 14, 15).

Any jury finding to the contrary would, as a matter of simple reason and justice, necessarily have to be set aside. On the contrary, the defect which allegedly caused plaintiff's fall was obvious (JA 14, 15), clearly visible in the daylight present at the time of the accident (JA 8) and had even been observed by plaintiff just one week before (JA 8). Accordingly, the trial court's finding, as a matter of law, that defendant had breached no duty owed plaintiff is the only conclusion which could possibly have been reached.

III

PLAINTIFF'S BRIEF FAILS TO DISCUSS THE DECISIONS DETERMINATIVE OF HER APPEAL

Plaintiff's brief contains a total of seven pages of argument. Four of these seven pages consist simply of a long excerpt from *Daisey*. However, as shown below, *Daisey* is completely distinguishable on the facts and legal issues there involved from those present here.

As can be seen from the foregoing sections, *Firfer, Standard Engineering Co.* and *Lord,* are determinative of plaintiff's appeal here and although these three decisions were cited in our memorandum of points and authorities filed below in support of our motion for summary judgment, were obviously relied upon by the trial court in granting the motion and will necessarily be the principal cases relied upon by defendant, significantly, there is no discussion whatsoever in plaintiff's brief of these decisions. The obvious reason for this startling omission is the plain fact that these cases, determinative of this appeal, simply cannot be distinguished by plaintiff.

Daisey v. Colonial Parking, Inc., 1963, 118 U.S.App.D.C. 31, 331 F.2d 777, cited by plaintiff, does not support plaintiff's contentions here but if applied to the facts in the instant case, would require affirmance.

> "[A] trespasser 'may recover only for intentional, wanton, or wilful injury or the maintenance of a hidden engine of destruction.' " 118 U.S. App. D.C. at 32, 331 F.2d at 778.

The Court went on to note this rule is subject to certain exceptions which obviously do not apply to the facts of the instant case, such as the attractive nuisance doctrine applicable to a child trespasser and another exception involved there:

> "If a landholder 'arranges part of his premises so as to lead people to think that they are part of the highway, *e.g.*, by paving part of his land as a continuation of the sidewalk, he comes under a duty of care to keep that part of his land reasonably safe for travelers.'" 118 U.S.App.D.C. at 32-33, 331 F.2d 778-779.

Here, there can be no contention that the attractive nuisance exception to the rule applies. Equally beyond question is the total absence of any basis for the application of the foregoing exception since plaintiff *knew* she was on private property (JA 5), nor can it be claimed she then believed she was on a mere continuance of a paved public way since she testified she was crossing an *unpaved, dirt parking lot* at the time she fell (JA 6). In these circumstances, the exception applied in *Daisey*—where premises were arranged in a manner so as to mislead travelers into believing they were on a continuation of a public way—could not possibly apply.

McGettigan v. National Bank of Washington, 1963, 115 U.S. App.D.C. 384, 320 F.2d 703, is marked with an asterisk in plaintiff's table of cases, indicating it is a case chiefly relied upon by plaintiff. Again, there is no discussion of the case in plaintiff's brief, which like *Daisey*, applies another exception obviously not applicable here—the attractive nuisance exception which the opinion specifically states does not apply to adults. 115 U.S.App.D.C. at 387 n.4, 320 F.2d at 706 n.4.

There is merely a four-line comment on *McGettigan* (Brief, p. 6), which makes the flat assertion that plaintiff is entitled to have the jury make a determination "of the ultimate issues of [the] *rights* [and] *duties* [of the parties]." To say that plaintiff is entitled to have the *jury* determine the *legal rights* and *duties* of the parties in a civil negligence action is so completely contrary to settled law as to require no comment.

Other cases listed in plaintiff's table of cases are equally and as obviously not in point. *Gleason v. Academy of the Holy Cross* involved injury to one who was an *invitee* and the defect causing the injury was a *latent* or *hidden danger*—not the factual situation here. *Kermarec* also falls into this category of cases obviously and clearly not in point here. The Supreme Court there held that grant of judgment n.o.v. for defendant would have been proper where the guest of a crew member of a ship docked in New York was injured from a fall caused by a defect in a stairway of the vessel, if the common law of New York applied—a comment which supports affirmance here. However, the Court held that since admiralty rather than common law applied, the judgment should be reversed. It is difficult to believe that these decisions were seriously advanced in support of reversal here.

IV

CONTRIBUTORY NEGLIGENCE OR ASSUMPTION OF THE RISK NOT INVOLVED HERE

It is clear from plaintiff's citation of *Nielsen v. Barclay Corp., Trust v. Washington-Sheraton Corp., Mosheuvel v. District of Columbia, Kane v. Northern Central Ry.* and *Altemus v. Talmadge,* that she mistakenly believes one ground for the grant of defendant's motion for summary judgment was a finding that plaintiff was guilty of contributory negligence or assumption of the risk as a matter of law.

However, the court simply found that "plaintiff took upon herself the risk of the unconcealed danger allegedly causing her to fall, which was obvious at the time and could have been avoided with proper care." This language is virtually identical with the language contained in *Lord* and *Firfer.*

> "Thus he took upon himself the risk of unconcealed dangers, natural to a situation obvious at the time.

> It was not shown that the landlord failed in any duty owed to Mr. Lord, and under the circumstances the trial judge correctly concluded that Mr. Lord had failed to establish an element essential to his recovery." *Lord v. Lencshire House*, 1959, 106 U.S.App. D.C. 328, 332, 272 F.2d 557.
>
> "He takes upon himself the risk of unconcealed dangers which are natural to the place and can be avoided by proper care." *Firfer v. United States*, 1953, 93 U.S.App.D.C. 216 at 219, 208 F.2d 524 at 527.

It is clear from an examination of the decisions in *Lord* and *Firfer*, that the court below was not speaking in terms of contributory negligence or assumption of the risk, but merely stating that *in the absence of breach by the landholder of any duty owed the injured person*, the latter takes the premises as he finds them. Accordingly, the contributory negligence and assumption of the risk cases cited by plaintiff, none of which involve the respective rights and duties of the occupier of land vis-a-vis a bare licensee or licensee by acquiescence using such land, are simply not in point.

CONCLUSION

The relevant facts involved on this appeal are few, uncomplicated and undisputed. Although plaintiff suggests that defendant did not inquire of plaintiff how the accident happened and that the record does not establish exactly what the lighting conditions were and what was apparent to plaintiff (Brief, p. 8), the record conclusively establishes that these assertions are simply not true (JA 7-8).

More important, how the accident happened and whether or not it was dark or light at the scene of the accident is totally and completely irrelevant in determining whether or not the trial court

properly found as a matter of law that defendant had breached no duty owed plaintiff.

The law is settled that the duty owed and the degree of care required to be exercised by defendant here towards plaintiff depends upon her status at the time she was allegedly injured. Her status is determined by the "mutual benefit" test. Since it is not disputed that she was on her way home, did not intend to go to defendant's theater, had no business at the theater and her use of the property was merely to take a shortcut across defendant's theater parking lot, it cannot be disputed that her use of the property was solely and entirely for her own mere convenience or benefit. In these circumstances, applying the "mutual benefit" test, plaintiff was a bare licensee or licensee by acquiescence at the time she allegedly fell.

It is likewise settled that the only duty owed by defendant to plaintiff—a bare licensee or licensee by acquiescence—is merely to refrain from "wanton injury" and "from knowingly permitting her to run upon a hidden peril or a hidden engine of destruction". Plaintiff's own deposition testimony and the photographs showing the scene of the accident conclusively establish that plaintiff was not "wantonly injured" by defendant. The defect which allegedly caused plaintiff's fall, by no stretch of the imagination could be termed a "concealed danger", a "hidden peril" or a "hidden engine of destruction". On the contrary, the defect involved was not only obvious but had even been observed by plaintiff just a week before.

Accordingly, the trial court's finding as a matter of law that defendant had breached no duty owed plaintiff, is the only conclusion which could possibly have been reached here and the judgment for defendant below must be affirmed.

Turning to plaintiff's contentions—her brief totally fails to address itself to the decisions of this Court cited by defendant

below which are determinative of this appeal. The cases cited by plaintiff are not concerned with the rule involved here but only its exceptions—the attractive nuisance exception, the hidden or latent defect exception or the apparent extension of the public way across private property exception—none of which could by any stretch of the imagination apply under the facts here.

As we have seen, contributory negligence or assumption of the risk is not involved here. The decisions of this Court cited by defendant conclusively establish that *in the absence of breach by the landholder of any duty owed the injured person,* the latter simply takes the premises as he finds them.

Although for the purpose of its motion for summary judgment defendant did not dispute plaintiff's claim of injury, since the undisputed facts of this case conclusively established that plaintiff's injury did not result from the breach by defendant of any duty owed plaintiff, there was no genuine question of fact as to any material issue and the grant of summary judgment for defendant below must be affirmed.

Respectfully submitted,

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